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No. 87-76

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In the Supreme Court of the United States

OCTOBER TERM, 1987

DAVID W. LEWIS, PETITIONER

v.

RICHARD MYSHAK, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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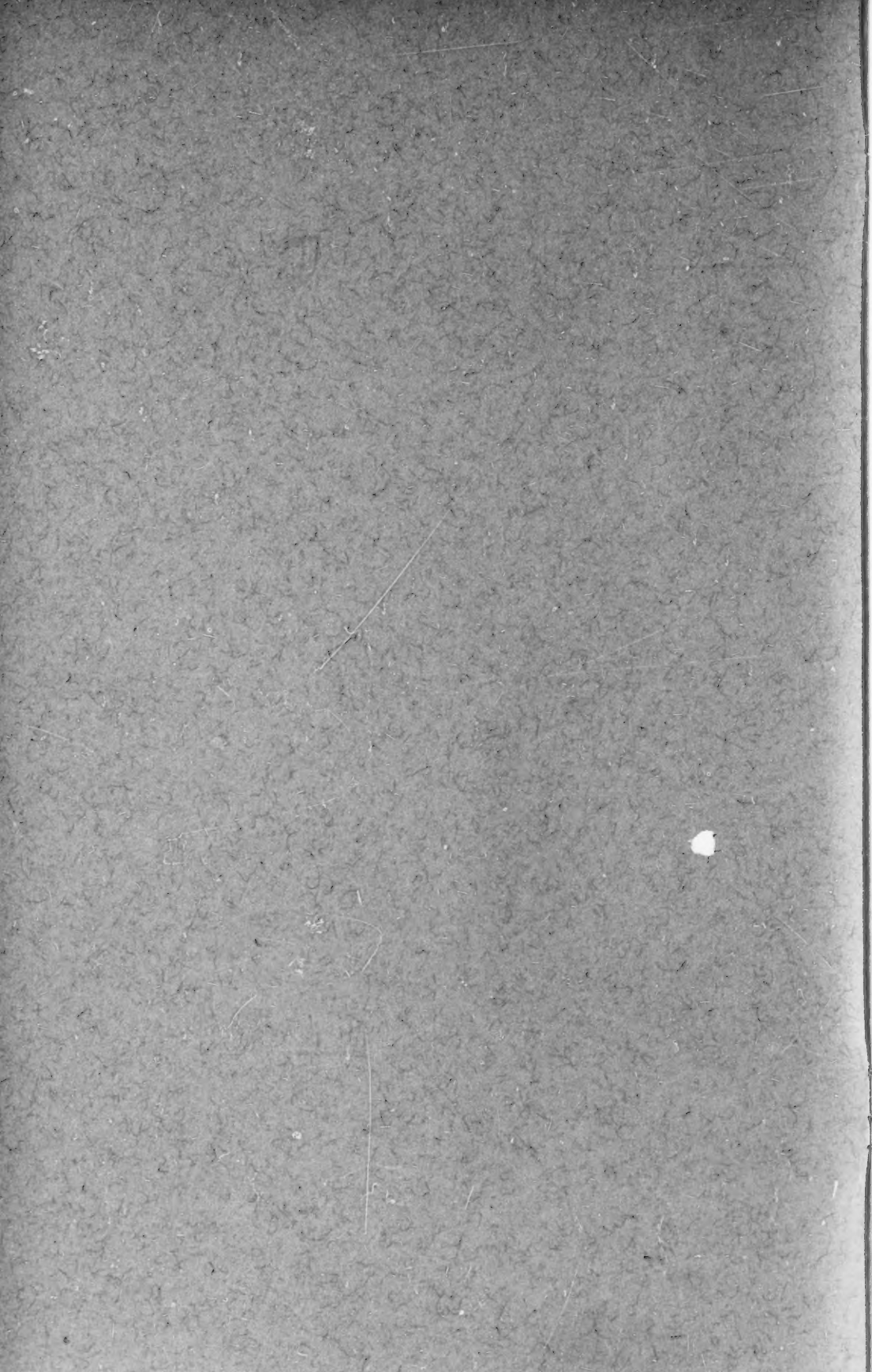


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Petitioner contends that he is entitled to supplement the comprehensive scheme of remedies provided tenured federal employees by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, with a *Bivens* action against his supervisors, sued in their individual capacities. His argument is foreclosed by this Court's decision in *Bush v. Lucas*, 462 U.S. 367 (1983), and merits no further review.

1. Petitioner, a biologist with the Department of the Interior's Fish and Wildlife Service, was charged with a conflict of interest violation and terminated by his agency. He appealed his termination to the Merit Systems Protection Board (MSPB), which affirmed the finding of a violation but concluded that petitioner's supervisors had not followed Department of the Interior regulations dealing with the resolution of conflicts of interest. See 43 C.F.R. 20.735-40. Accordingly, the MSPB held that the maximum allowable penalty for petitioner's infraction was a thirty-day suspension. No suspension was ordered, however, and petitioner was reinstated to his former position. See Pet. App. 2. Petitioner chose not to appeal the

MSPB's ruling to the United States Court of Appeals for the Federal Circuit, as he was entitled to do under 5 U.S.C. 7703(b)(1).

Petitioner subsequently filed this suit in state court seeking damages from his supervisors under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Petitioner claimed that his supervisors, by failing to follow conflict-of-interest regulations, deprived him of both liberty and property without due process of law. The case was removed to federal district court, where the complaint was amended to include a Federal Tort Claims Act (FTCA) claim against the United States. Pet. App. 3.

2. The district court dismissed the complaint (Pet. App. 8-10), holding that the FTCA claim was untimely and that the *Bivens* suit was barred by this Court's decision in *Bush v. Lucas*, 462 U.S. 367 (1983). The court of appeals, in an unreported per curiam opinion, affirmed (Pet. App. 1-5). The court noted that both *Bush v. Lucas*, *supra*, and the court of appeals' own decision in *Veit v. Heckler*, 746 F.2d 508 (1984), establish that federal courts have no power to create remedies outside the CSRA to remedy personnel actions taken against tenured federal employees (Pet. App. 3-4). The court of appeals also agreed that petitioner's FTCA claim was untimely (*id.* at 5). This petition, raising only the *Bivens* issue, followed.

3. In *Bush v. Lucas*, *supra*, the Court held that a federal employee could not bring a nonstatutory suit for damages against his superiors based on the allegation that his dismissal was the product of unconstitutional conduct. The Court explained (462 U.S. at 368): "Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, * * * it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Bush* controls this case.

Petitioner does not attempt to distinguish *Bush*. Instead, he contends (Pet. 6) that there is a conflict between the Ninth Circuit's decision and the decision of the United States Court of Appeals for the District of Columbia Circuit in *Carducci v. Regan*, 714 F.2d 171 (1983). *Carducci*, however, did not even involve the issue raised here, whether a court may create a *Bivens* remedy to augment the remedies of tenured employees under the CSRA. Rather, that case dealt with whether agency personnel actions, involving non-constitutional claims once reviewable under the APA, continued to be reviewable after enactment of the CSRA. The D.C. Circuit held that Congress, by its enactment of the CSRA, precluded review of minor personnel actions that, prior to the CSRA's passage, were reviewable under the APA. The court noted that if this were not the case, "the exhaustive remedial scheme of the CSRA would be impermissibly frustrated" by permitting, for lesser personnel actions, "an access to the courts more immediate and direct than the statute provides with regard to major adverse actions." 714 F.2d at 174.

The court in *Carducci* did not address the availability of *Bivens* relief to federal employees who, like the petitioner, have comprehensive administrative and judicial remedies provided by statute.¹ As noted, that issue was settled by this Court in *Bush*, and the lower courts are unanimous in holding that tenured federal employees do not have a *Bivens* remedy available to them, but must challenge adverse personnel actions by the procedures afforded them under the CSRA. See, e.g., *Harding v. United States*

¹ Contrary to petitioner's suggestion (Pet. 6), the court of appeals did not even purport to leave this question open. No *Bivens* claim for damages against plaintiff's supervisors, sued in their individual capacities, was in question. The court did, however, leave open the very different question whether the plaintiff was entitled to APA review of his constitutional claims against the agency (714 F.2d at 177).

Postal Service, 802 F.2d 766 (4th Cir. 1986); *Hallock v. Moses*, 731 F.2d 754 (11th Cir. 1984).²

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987

² There is no conflict over the application of *Bush* to tenured federal employees such as petitioner, who have comprehensive remedies, including administrative and judicial review, under the CSRA. We note, however, that the United States has filed a petition for certiorari in *Cooper v. Kotarski*, No. 86-1813, where a circuit conflict has developed over the application of *Bush* to probationary employees, who have expressly limited remedies under the CSRA. In addition, this Court has granted certiorari to decide whether non-veteran personnel in the excepted service, who have no right of review under the CSRA, may obtain judicial review of adverse personnel actions under the Tucker Act, 28 U.S.C. 1491. *United States v. Fausto*, cert. granted, No. 86-595 (Jan. 12, 1987). Neither of those issues is presented in this case. Petitioner had the full complement of remedies under the CSRA available to him, including both MSPB and judicial review.

